



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

FOIPA REQUEST

Case No.: 2010-0133
Date Rec'd: 2-16-10
Specialist: Alennis
Referred Case: _____

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 5, 2010

FOIA/PA Officer
U.S. Nuclear Regulatory Commission
FOIA Officer Mail Stop T5-F11
Washington, DC 20555-0001

Dear FOIA/PA Officer:

Pursuant to the Freedom of Information Act (FOIA) and related regulations, I respectfully request that the Nuclear Regulatory Commission (NRC) provide copies of any and all versions of the following documents:

- (1) The 1968 report performed by A.V. Smith Engineering Company referenced in the Final Facility Description and Safety Analysis Report, Consolidated Edison Company of New York, Indian Point Nuclear Generating Unit No. 2 (Oct. 15, 1968) at section 5.1.3.12 (Cathodic Protection);
- (2) all documents or communications concerning work done for ConEdison, NYPA/PASNY, or Entergy (or their agents, contractors, affiliates, or subsidiaries) by the A.V. Smith Engineering Company concerning Indian Point Nuclear Power Plants Units 1, 2, or 3;
- (3) all communications between or involving the Atomic Energy Commission (AEC) and A.V. Smith Engineering Company;
- (4) all communications between or involving the NRC and A.V. Smith Engineering Company;
- (5) any communication between AEC and any owner or operator of Indian Point Nuclear Power Plants Units 1, 2, or 3 concerning cathodic protection on any aboveground or underground pipes and tanks at any of the three units; and

(6) any communication between NRC and any owner or operator of Indian Point Nuclear Power Plants Units 1, 2, or 3 concerning cathodic protection on any aboveground or underground pipes and tanks at any of the three units.

This request includes any documents or information, including, but not limited to, any memoranda, attachments, enclosures, evaluations, reports, appendices, charts, diagrams, maps, electronic files, and/or transmittal letters that accompany/accompanied such documents or communications.

This information is requested by the Office of the New York State Attorney General in the course of its official governmental duties on behalf of the People of the State of New York. This request is not based on a commercial interest of the requester.

Request for Waiver of Fees

New York State hereby requests that the NRC waive all fees associated with this request. The public disclosure of the requested information will promote the public interest and public understanding of NRC's relationship with, or oversight of, the three Indian Point Units. Accordingly, the NRC should waive any fees associated with this request. Indeed, given that the requested information is in the public interest (as opposed to a commercial interest, an individual, private interest, or an academic research project), Congress has mandated that the NRC waive fees for copies of the above-requested reports and documents. *See* 5 U.S.C. §552 (a)(4)(A)(iii) ("Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). Because this request satisfies the operative statutory standard, NRC must waive any fees associated with this request. Consistent with this Congressional directive, New York State hereby requests that the NRC waive all fees associated with this request.

Plainly, the information sought by this request will contribute to the public's understanding of the operations of the federal government. *See* 10 C.F.R. § 9.41(c). New York's FOIA request seeks information about cathodic protection used at Entergy Indian Point Nuclear Power Plants Units 1, 2, and 3. This information will further the public's understanding of natural soil and water induced corrosion on pipes and tanks at existing nuclear power plants, and the operations or activities of the federal government. *See* 10 C.F.R. § 9.41(d)(1). Release of this information will allow New York State to understand the operations of the NRC and, possibly, the NRC's interactions with, and the operations of, other federal agencies (*e.g.* EPA, DOE, Army Corps of Engineers) or private entities. *See* 10 C.F.R. § 9.41(d)(2). Release of the information will increase the ability of New York State residents to better understand the corrosion mechanism for pipes and tanks at Nuclear Plants and how the NRC exercises its authority to prevent corrosion and subsequent leaks. Finally, as noted above, the Attorney General's Office submits this request, not as a commercial competitor, but in the exercise of its

sovereign governmental functions and on behalf of the People of the State of New York. *See* 10 C.F.R. §9.41(d)(3). If the NRC wishes, the requested information may be placed on the public portions of the ADAMS document system.

New York State provides the following additional information that you may also wish to consider as part of the fee waiver request. The Office of the Attorney General intends to use the information obtained in the furtherance of its official governmental functions on behalf of the People of the State of New York. By way of example, such functions include participating in Atomic Safety and Licensing Board proceedings, generic issue proceedings, and other NRC activities. The Office of the Attorney General will extract and analyze the information contained in the documents to consider safety and environmental issues surrounding buried pipes and tanks at all three Indian Point Nuclear Power Plant Units. The Office may use or reference information contained in the requested documents in various New York State administrative proceedings or NRC administrative proceedings (*e.g.*, PSC # E 08-0077, ASLBP # 50-247-LR and 50-286-LR) and/or to evaluate NRC staff work product (*e.g.*, Safety Evaluation Reports, Supplemental Environmental Impact Statements). The likely impact of the release of the requested information will be a substantial increase in the public understanding of the implications of corrosion on buried pipes and tanks at the Indian Point Nuclear Power Plants when compared to the public's understanding before the release of such documents. At present, the public does not have access to various documents concerning cathodic protection and therefore its understanding of the hazard caused by corrosion is impeded. At the same time, the public does not have a complete understanding of the interactions between NRC and other federal agencies or private entities concerning these issues.

The release of the information could increase the understanding of numerous citizens. For example, and as you may be aware, each day more than 17 million American citizens live, work, attend school, or travel within 50 miles of the Indian Point facilities. The NRC has acknowledged that the Indian Point facilities have the highest surrounding population density of any power reactor in the Nation. The Office may include the requested information in potential future filings or communications with the NRC and/or other federal or state governmental bodies; as such, the content of such filings would be available to the public through the operative proceeding or by request. Additionally, federal agencies typically post such filings in a publicly available docket (*e.g.*, NRC Rulemaking Docket; NRC Electronic Hearing Docket, ASLBP # 07-858-03-LR-BD01). Further, as noted, if the NRC wishes, it may post the requested information at one or more locations on its web site so that the public may view it. None of these methods would entail a charge to a citizen who wished to review the information.

Without seeing the quality and quantity of the information, it is difficult to guarantee the exact title, date, or length of a document that would contain the requested information. Nevertheless, the Office of the Attorney General anticipates that the information gleaned from the request would be incorporated in, for example and without limitation, the State's public petitions and other submissions to the NRC and public filings with the New York State Public Service Commission.

The Office of the Attorney General disseminates its filings in a variety of ways, including but not limited to the State's participation in NRC and PSC proceedings, the posting of the

State's filings in those proceedings on various web sites, OAG-facilitated public meetings, OAG participation in NRC public meetings, OAG press releases, and various media reports on the OAG's activities with respect to NRC regulatory issues. Such participation, activities, and demonstrated capacity confirm that the State has satisfied the dissemination factor used in 10 C.F.R. § 9.41(b)(6). Additionally, federal agencies typically post such filings in a publicly available docket (e.g., NRC Rulemaking Docket; NRC Electronic Hearing Docket, ASLBP # 07-858-03-LR-BD01). Such documents would also be available on various public web sites, including, for example, those maintained by the New York Public Service Commission and the Nuclear Regulatory Commission (e.g., NRC Agencywide Documents Access and Management System (ADAMS)). Further, as noted, if the NRC wishes, it may post the requested information at one or more locations on its web site so that the public may view it. None of these methods would entail a charge to a citizen who wished to review the information.

Separate and apart from such postings, such documents would be available directly from the Office of the Attorney General. In addition, the Office of the Attorney General will continue to publicize various filings it makes with respect to the development of NRC regulations and/or the Indian Point facilities, which will increase the public awareness of such filing and their content. Various media (internet, print, radio, television) may report on such filings in the future. Assuming that the NRC actually possesses information and documents that are responsive to the State's FOIA request, such response would also be available from the Office of the Attorney General and, presumably, also from the NRC's public ADAMS site.

Furthermore, over the past two years, the Office of the Attorney General has organized public forums around the State during which citizens and staff may discuss issues of interest to a particular community. In addition, representatives of the Office of the Attorney General have attended public meetings convened by the Nuclear Regulatory Commission and have submitted public comments about issues of concern during such meetings. Such comments have been based, in part, on public information from the NRC. The Office plans to attend future meetings scheduled by the NRC.

The various means for dissemination identified by the State easily satisfy the applicable standard for fee waivers. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003). Thus, there is no basis to deny this Office's application that the NRC waive all fees associated with this FOIA request. The Office of the Attorney General notes that Congress intended that § 552(a)(4)(A)(iii) be liberally construed in favor of granting fee waivers. *See* 132 Cong. Record at S14, 298 (Sept. 30, 1986) (Sen. Leahy); *id.* at H9464 (Oct. 8, 1986) (Rep. English). In enacting the provision, Congress sought to ensure that noncommercial requesters would be granted fee waivers on a routine basis. *See id.* at S16496 (Oct. 15, 1986) (colloquy between Sens. Kerry and Leahy); *id.* at S14,299 (Sept. 30, 1986) (Sen. Leahy). While the applicable statutory framework authorizes an agency to charge fees in cases in which FOIA requests are made for a "commercial" purpose, the State of New York's underlying request plainly is not for a commercial purpose. New York respectfully submits that the State's underlying request, which seeks information about the operations or activities of the federal government, will contribute to the public understanding of the government's operations and activities and will further the public interest. Accordingly, the NRC should waive any fees associated with the request. *Judicial Watch*, 326 F.3d 1309 ("Congress amended FOIA to ensure that it is 'liberally construed in favor

of waivers for noncommercial requesters.”). The State notes that the recent decision in *Manley v. Department of the Navy*, Civil Action No. 1:07-cv-721, slip op., 2008 WL 4326448 (S.D. Ohio Sept. 22, 2008) (overturning federal administrative decision denying a FOIA fee waiver application), further supports the State’s request for a waiver of all fees associated with this request.

To reiterate, the Attorney General’s Office submits this request, not as a commercial competitor, but in the exercise of its sovereign governmental functions and on behalf of the People of the State of New York.

Accordingly, the NRC should waive all fees associated with this FOIA request.

Conclusion

Please produce all responsive documents within 10 days of the receipt of this letter. If you have any questions concerning this FOIA request, please contact me by e-mail (Teresa.Fountain@ag.ny.gov). Thank you for your attention to this matter.

Sincerely,

s/

Teresa Fountain
Legal Assistant

Stokes, Crystal

From: Teresa Fountain [Teresa.Fountain@ag.ny.gov]
Sent: Friday, February 05, 2010 2:46 PM
To: FOIA Resource
Cc: John Sipos
Subject: FOIA Request for Document
Attachments: 2010 02 05 OAG FOIA Request to NRC for AVSE docs.pdf

Dear Sir/Madam:

Attached is w request for information under FOIA. Please contact me if you have any questions.

Thank you,

Teresa Fountain
Legal Assistant 1
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224